

## REMARKS

Claims 39 and 44-47 remain pending in this application. Claims 1-38 and 40-43 were previously canceled. Applicants reserve the right to file one or more continuation, divisional, or continuation-in-part applications directed to any canceled subject matter. No new matter is added in this amendment.

### **I. Claims 39 and 44-47 are not Anticipated by Sole**

Claims 39 and 44-47 are rejected on pages 2-3 of the office action under 35 U.S.C. § 102(e) as allegedly anticipated by U.S. Patent Number 6,232,346 to Sole et al. ("Sole").

The claims encompass, *inter alia*, methods for inhibiting the loss of learning ability or increasing the learning ability of an aged companion pet in need of such treatment comprising feeding the pet a composition comprising: (i) a mixture of antioxidants at levels sufficient to accomplish the said inhibiting or increasing, the mixture of antioxidants comprising at least about 100 ppm Vitamin E, at least about 50 ppm Vitamin C, and from 25 to 600 ppm alpha lipoic acid; (ii) a source of protein; and (iii) a source of fiber.

According to the office action, Sole teaches a method comprising administering to a mammal an effective amount of a nutritional supplement comprising L-carnitine, coenzyme Q10 (ubiquinone) and taurine in combination with vitamin E, vitamin C, cysteine, selenium, thiamine, and creatine. Further, Sole discloses a liquid supplement containing about: 2.7 grams of taurine, 2.7 grams of carnitine (11000 ppm), 135 mg coenzyme Q10 plus antioxidant vitamins such as 400 IU vitamin E (800 ppm) and 250 mg vitamin C (1000 ppm) and 1.75 grams of creatine per 250 milliliters.

As the Examiner is aware, to establish anticipation, a single prior art reference must disclose each and every limitation of a claim either expressly or inherently. See *Celeritas Techs. Ltd. v. Rockwell Int'l Corp.*, 150 F.3d 1354, 1360 (Fed. Cir. 1998); *Standard Havens Prods., Inc. v. Gencor. Indus., Inc.*, 953 F.2d 1360, 1369 (Fed. Cir. 1991); *Jamesbury Corp. v. Litton Indus., Inc.* 756 F.2d (Fed. Cir. 1985); *American Hospital Supply v. Travenol Labs.*, 745 F.2d 1 (Fed. Cir. 1984) (holding that prior art is anticipatory only if every

element of the claimed invention is disclosed in a single item of prior art). There must be no difference between the claimed invention and the reference disclosure as viewed by one of ordinary skill in the art. *See Scripps Clinic & Research Found. v. Genentech, Inc.*, 927 F.2d 1565, 1576 (Fed. Cir. 1991); *Carella v. Starlight Archery Co.*, 804 F.2d 135, 138 (Fed. Cir. 1986); *RCA Corp. v. Applied Digital Data Sys.*, 730 F.2d 1440, 1444 (Fed. Cir. 1984) (holding that anticipation requires that all of the elements and limitations of the claim are found within a single prior art reference).

Applicants respectfully submit that the claims, as amended, are not anticipated by Sole. Specifically, Sole does not disclose methods for inhibiting the loss of learning ability or increasing the learning ability of an aged companion pet in need of such treatment comprising feeding the pet a composition comprising: (i) a mixture of antioxidants at levels sufficient to accomplish the said inhibiting or increasing, the mixture of antioxidants comprising at least about 100 ppm Vitamin E, at least about 50 ppm Vitamin C, and from 25 to 600 ppm alpha lipoic acid; (ii) a source of protein; and (iii) a source of fiber.

Because each and every limitation of the claimed invention is not disclosed in Sole, the claims cannot be anticipated. Applicants respectfully submit that the rejection of claims 39 and 44-47 under 35 U.S.C. § 102(e) should be reconsidered and withdrawn.

## **II. The Rejections Under 35 U.S.C. § 103(a) Should be Withdrawn**

Claims 39 and 44-47 are rejected on pages 4-8 of the office action under 35 U.S.C. § 103(a) as allegedly obvious over Sole in view of Hagen et al., FASEB J., 13:411-418, Feb. 1999 ("Hagen").

According to the office action, Sole teaches a method comprising administering to a mammal an effective amount of a nutritional supplement comprising L-carnitine, coenzyme Q10 (ubiquinone) and taurine in combination with vitamin E, vitamin C, cysteine, selenium, thiamine, and creatine. Further, Sole discloses a liquid supplement containing about: 2.7 grams of taurine, 2.7 grams of carnitine (11000 ppm), 135 mg

coenzyme Q10 plus antioxidant vitamins such as 400 IU vitamin E (800 ppm) and 250 mg vitamin C (1000 ppm) and 1.75 grams of creatine per 250 milliliters.

The office action further states that Hagen “discloses feeding  $\alpha$ -lipoic acid (0.5% w/w = 5000 ppm) to old rats for 2 weeks restores mitochondrial function, lowers oxidants to the level of a young rats [sic] and increases ambulatory activity (abstract).” (*Id.*). It further teaches that lipoic acid supplementation improves indices of metabolic activity as well as lowers oxidative stress and damage evident in aging (abstract). (*Id.*).

Applicants respectfully traverse the rejection for at least the following reasons.

The U.S. Supreme Court analyzed the test for obviousness in *KSR International Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007). “There is no necessary inconsistency between the [teaching, suggestion, motivation] test and the *Graham* analysis. But a court errs where it transforms general principle into a rigid rule limiting the obviousness inquiry.” *Id.* The Supreme Court’s analysis in *KSR* relies on several assumptions about the prior art landscape. First, *KSR* assumes a starting reference point or points in the art, prior to the time of invention, from which a skilled artisan might identify a problem and pursue potential solutions. Second, *KSR* presupposes that the record up to the time of invention would give some reasons, available within the knowledge of one of skill in the art, to make particular modifications to achieve the claimed [invention]. *Takeda Chemical Industries, LTD et al. v. Alphapharm PTY., Ltd.*, 492 F.3d 1350, 1357 (Fed. Cir. 2007). Third, the Supreme Court’s analysis in *KSR* presumes that the record before the time of invention would supply some reasons for narrowing the prior art universe to a “finite number of identified, predictable solutions,” *KSR* 127 S. Ct. at 1742. In *Ortho-McNeil Pharmaceutical, Inc. v. Mylan Laboratories, Inc.*, 520 F.3d 1358, 1364 (Fed. Cir. 2008), the Federal Circuit further explained that this “easily traversed, small and finite number of alternatives . . . might support an inference of obviousness.” However, to the extent an art is unpredictable, as the chemical arts often are, *KSR*’s focus on these “identified, predictable solutions” may present a difficult hurdle because potential solutions are less likely to be genuinely predictable. *See Takeda*.

The pending claims encompass methods for inhibiting the loss of learning ability or increasing the learning ability of an aged companion pet in need of such treatment comprising feeding the pet a composition comprising: (i) a mixture of antioxidants at levels sufficient to accomplish the said inhibiting or increasing, the mixture of antioxidants comprising at least about 100 ppm Vitamin E, at least about 50 ppm Vitamin C, and from 25 to 600 ppm alpha lipoic acid; (ii) a source of protein; and (iii) a source of fiber.

The mere fact that references individually include among other ingredients the claimed combination is not a suggestion to modify the teachings of the reference to suggest the claimed invention. Indeed, the Supreme Court's analysis in *KSR* presumes that the record before the time of invention would supply some reasons for narrowing the prior art universe to a "finite number of identified, predictable solutions," *KSR* 127 S. Ct. at 1742. Nothing in the combination of reference suggests a composition including vitamin E, vitamin C, alpha-lipoic acid, a source of protein and a source of fiber. Indeed, both references are each silent with regard to a source of protein and a source of fiber. As the Examiner is aware, there must be some evidence that would provide some reasons, available within the knowledge of one of skill in the art, to make particular modifications to achieve the claimed invention. *Takeda Chemical Industries, LTD et al. v. Alphapharm PTY., Ltd.*, 492 F.3d 1350, 1357 (Fed. Cir. 2007).

Therefore, Applicants respectfully request that the rejection of claims 39 and 44-47 under 35 U.S.C. § 103(a) be reconsidered and withdrawn.

### **III. Conclusion**

There being no other rejections of record, Applicants believe that the claims are now in an allowable condition and respectfully request an early Notice of Allowance.

The Examiner is invited to telephone the undersigned if that would be helpful to resolving any issues.

Respectfully submitted,

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